IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1249 OF 2007

In

SUIT NO.2757 OF 2006

Madhavji Jeyram Kotak & Ors. : Plaintiffs

V/s.

Jay Laxmi Gopalji Surji & Ors. : Defendants

And

Dr.Anand Chauhan : Applicant

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Mr.Niranjan Pandit with Mr.R.U.Singh for the applicant in support.

Mr.D. Madan with Mr.Dharam Jumani i/b. Hariani & Co., for the plaintiffs to show cause.

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CORAM : A.M. KHANWILKAR, J.

DATE : APRIL 18, 2007.

ORAL ORDER :

1. Heard the counsel for the parties. Perused the relevant pleadings.

2. A preliminary objection is taken on behalf of the plaintiffs that the applicant, who is a third party, cannot be permitted to seek relief "simplicitor" of

vacating the ad-interim order passed by this Court on 17.10.2006 without a formal prayer for being joined as a party-defendant to the suit.

3. The applicant-third party, however, contends that the applicant is entitled for asking the relief simplicitor of vacating the order dated 17.10.2006 without being joined as a party to the suit. According to the applicant, this application has been filed under Order Order XXXIX Rule 4 of the C.P.C., which permits even a third-party to apply for vacating an interim order passed by the Court.

4. To my mind, going by the language of Order XXXIX Rule 4, the plaintiffs are right in contending that such an application cannot be entertained at the instance of a "third-party" to the suit; for the expression employed in rule 4 is "any party". That expression would necessarily mean that only a party to the suit can invoke the remedy under Order XXXIX Rule 4 of the C.P.C. There is marked distinction between the words "any party" and "aggrieved person". The expression "party" is not defined in the Code of Civil Procedure. The meaning of word "party" in the common parlance refers to those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant. On the other hand, an "aggrieved person" is one whose legal right is affected directly and

adversely by a decision of the Court.

5. To buttress the submission, the counsel for the applicant, however, has drawn my attention to the provisions of Order XXXIX Rules 1, 6 and 7 where the expression used is "any party to a suit". Relying on the said provisions, it is argued that the Legislature was conscious of the distinction between the expressions "any party to a suit" and "any party". In other words, it is contended that "any party" means "any person", "an aggrieved person" or "a third-party". However, to my mind, the setting in which rule 4 of Order XXXIX has been placed and going by the scheme of Order XXXIX, I am inclined to accept the submission of the plaintiffs that the expression "any party" in rule 4 would mean any party to the suit. The counsel for the plaintiffs has rightly drawn a distinction, relying on the expression used in Order XL Rule 1, sub-rule (2) of the C.P.C. which refers to "any person whom any party to the suit". The distinction between the word "person" and "party" is recognised at different places in the C.P.C.

6. To get over this position, the counsel for the applicant would contend that in that case, the Motion filed by the applicant be treated as one under section 151 of the C.P.C. In the first place, it was necessary for

the applicant to spell out the provisions under which the present application has been filed, in the application itself. Assuming that the applicant can now be shown indulgence of contending that the application be treated as one under section 151 of the C.P.C., even then, the applicant does not deserve any indulgence from this Court. This is so because, the counsel for the applicant fairly accepts that the case of the applicant is that he has purchased the suit property through some of the defendants. Indeed, according to the applicant, he has become owner of the portion of the suit property on account of a consent decree in some proceedings between the defendants and the applicant. It also appears that subsequent thereto, the claim of the applicant in relation to the portion of the suit property has been shown in the Index II Register as well as in the 7/12 extracts. Nevertheless, the fact remains that the applicant is claiming through the defendants. In such a situation, the applicant cannot stay away from the proceedings pending against the defendants and yet ask for vacating the interim order passed by this Court against the defendants. In that sense, the applicant is asserting right in respect of the suit property or portion thereof which is the subject-matter of the suit, claiming through the defendants in the present suit. If so, the applicant can be heard on the prayer for vacating the interim order

passed by this Court only if he were to show inclination to be impleaded as party-defendant to the suit; for the applicant will be a proper party to the suit, if not a necessary party. The counsel for the applicant, however, states that as presently advised, the applicant has no intention to be joined as party-defendant to the suit. If that is the approach of the applicant, surely the power under section 151 of the C.P.C. ought not to be exercised in favour of the applicant. This is so because, I find substance in the argument of the plaintiffs that take a situation where at the instance of the applicant, the interim relief was to be vacated and eventually the plaintiffs were to succeed in getting a decree against the defendants. In the meantime, the applicant was to dispose of the property or deal with the property which would prejudice the claim and the rights of the plaintiffs. Thus understood, no indulgence can be shown to the applicant even by exercising power under section 151 of the C.P.C., in the fact situation of the present case.

7. The counsel for the applicant tried to impress upon me that the preliminary question which has been raised by the plaintiffs has already been answered in an unreported order of a Division Bench of this Court dated 22.12.2005 in Notice of Motion no.3423 of 2005 in Appeal No.69 of 1994 (Narayan Manik Patil & Ors. v. Jaywant J. Patil &

Ors.). In the first place, on a reading of the said order, it does not appear that the Court was called upon to specifically answer the issue that has been raised before this Court. Indeed, the Court has referred to the fact that third-party had filed Notice of Motion for vacating the order of interim relief before this Court. However, whether such Notice of Motion was maintainable at the instance of a third-party, which is the specific question raised in the present matter, was neither pressed nor addressed in that decision. Instead, the Court proceeded to exercise power under section 151 of the Code in favour of the applicants before it in allowing them to withdraw the statement made earlier of withdrawing the application on the basis of wrong legal advice. By that order, this Court merely restored the Notice of Motion to file to its original number to be heard finally. No more and no less. The fact that ad-interim order was passed in that Motion makes no difference to the legal position. Unless it was a direct authority on the point that a third-party is entitled to file an application under Order XXXIX Rule 4 for vacating the interim order passed by the Court without even showing willingness to be joined as party-defendant to the suit, the unreported decision pressed into service is of no avail.

8. Reliance was also placed on the decision of the

Allahabad High Court in Surajdeo v. Board of Revenue, U.P. Allahabad & Ors. (AIR 1982 Allahabad 23). Once again, this authority is with regard to the power of the Court under section 151 of the C.P.C. I have already recorded reasons in the earlier part of this order that even if there is power under section 151 of the Code to show such indulgence, that will depend on the fact situation of every case. There can be no straight-jacket formula in that behalf. In the present case, as the applicant is indisputably claiming the right in a portion of the suit property through the defendants, it necessarily follows that the applicant will be a proper party, if not a necessary party to the suit between the plaintiffs and the defendants. The applicant, however, is unwilling to become party to the suit. For that reason, the applicant does not deserve any indulgence even in exercise of the powers under section 151 of the C.P.C.

9. The counsel for the applicant would then contend that, in fact, in the same suit, this Court has entertained Notice of Motion no.1001 of 2007 at the instance of a third-party who did not ask for relief of being joined as party-defendant to the suit. It is submitted that because of that order, the present applicant has been advised to take out the Notice of Motion for the limited relief of vacating the interim order without being joined as

party-defendant to the suit. This submission clearly overlooks that the order passed in Notice of Motion no.1001 of 2007 was by consent of both the parties. The counsel for the plaintiffs rightly points out that the plaintiffs gave consent in the said Motion for the simple reason that the property in respect of which the applicants therein were claiming right was not the subject-matter of the suit property, but that was wrongly mentioned in the public notice issued by the plaintiffs. That is an entirely different situation. In any case, that order was passed by consent of the parties. No preliminary objection was raised. In the present Notice of Motion, however, as the plaintiffs have chosen to raise a preliminary objection, this Court has no option but to consider that and take that plea to its logical end.

10. In the result, this Notice of Motion deserves to be dismissed and is, accordingly, dismissed.

Sd/-

A.M. KHANWILKAR, J.